

SANAMAS SDN BHD & ANOR v. CHIN AH MAN & ANOR

HIGH COURT SABAH & SARAWAK, KOTA KINABALU

CHRISTOPHER CHIN SOO YIN J

[CASE NO: BKI-22NCvC-43-6-2022]

29 MARCH 2023

Abstract – *The Federal Court, in its decisions in Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd and Sia Hiong Tee & Ors v. Chong Su Kong & Ors, could not have intended to undermine the administration of land law in Sabah when it described the Sabah Land Ordinance as a ‘modified Torrens System’. What modified Torrens System entailed or its scope and limitations was never defined. Based on the two decisions, the views of the Federal Court must, in the interest of certainty of land interests in Sabah, be limited and construed strictly and narrowly to the fragility of registered interests derived from some fraudulent act or against the interest of a beneficiary under an established bare trustee arrangement. Put simply, and by virtue of s. 88 of the Sabah Land Ordinance, registration is still everything in Sabah save in cases where an interest in land is derived through a fraudulent act or of a beneficiary under a bare trust being wrongly dispossessed of his right to a registered interest in the land concerned.*

LAND LAW: *Ownership – Interest – Competing equities – Developer disposed of one property to two different parties – Principle of ‘priorities’ – Modified Torrens System – Which of two parties of same property had priority over other – Which party ought to be registered and beneficial owner of property to entire exclusion of other – Sabah Land Ordinance, ss. 88 & 103*

LAND LAW: *Caveat – Caveatable interest – Developer disposed of one property to two different parties – Both parties entered caveat on property and both caveats registered with Land Registry – Functions of caveat under Sabah Land Ordinance*

LAND LAW: *Title – Registration – Torrens system – ‘Modified Torrens System’ in Sabah – Meaning, definition and limits to ‘modification’ – Sabah Land Ordinance*

Sanamas Sdn Bhd (‘Sanamas’) had sold a vacant lot (‘Lot 10’) to Sazone Development Sdn Bhd (‘in liquidation’) (‘developer’) in 1996 and, after signing a memorandum of transfer (‘MOT’), Lot 10 was transferred to the developer. Sanamas later purchased Lot 10 from the developer. In 2001, the plaintiffs purchased Lot 10, together with a four-storey shophouse to be built thereon, from the developer. With a gap of less than one week from the date of the sale and purchase agreement (‘SPA’), the plaintiff presented a caveat over Lot 10 with the SPA as the ground for caveatable interest. The plaintiff’s caveat over Lot 10 was accordingly registered. Sanamas presented

- A a caveat over Lot 10, citing the 1996 SPA as grounds for caveatable interest and Sanamas's caveat was registered; this was five years after the date of the 1996 SPA. Lot 10 was, however, transferred to the plaintiffs under a MOT ('MOT dated 27 October 2003'). This prompted Sanamas to commence a suit at the High Court against the developer, praying for specific performance of the 1996 SPA. The Assistant Collector for Land Revenue ('collector') ordered that the MOT dated 27 October 2003 of Lot 10 be cancelled ('collector's order dated 26 March 2010'). The plaintiffs appealed to the Director of Lands and Survey ('director'), against the decision of the collector, but the appeal was dismissed. Meanwhile, the High Court allowed Sanamas', *inter alia*, monetary compensation of RM1.68 million and liquidated damages of RM234,656 but did not allow specific performance ('HC judgment'). The plaintiffs, in the present *encl. 7*, sought declarations and/or orders that, *inter alia*, (i) the MOT dated 27 October 2002 was valid and subsisting; (ii) the collector's order dated 26 March 2010 was null and void; (iii) the prohibitory order and all other subsequent renewals to it, pursuant to the HC judgment, were null and void; and (iv) Sanamas surrenders the new title deed for Lot 10 to the collector for cancellation. The issue that arose for determination was which of the two purchasers of the same Lot 10 had priority over the other to extent of being entitled to be the registered and beneficial owner in Lot 10 to the entire exclusion of the other.

E **Held (allowing *encl. 7*):**

- (1) A private caveat under the Sabah Land Ordinance ('SLO') serves two functions: (i) the effect of a caveat is injunctive in nature in that it restricts (but not absolutely) dealings by the landowner/caveatee of any interest in the land caveated; and (ii) to give notice of the interest the caveator has over the land concerned. Such interest has to be a 'caveatable interest', which is not defined in the SLO. One thing was clear the private caveat gives notice of the caveator's interest in the property but it does not create any interest in the land. In Sabah, anyone who can show some semblance of caveatable interest can present a caveat. Any number of caveats could be presented over the same land. (paras 18, 20, 22, 23 & 38)
- (2) Section 88 of the SLO is evidence, if any is required, that Sabah land law had adopted, perhaps not in the way as it has been embraced in West Malaysia or in Sarawak, the Torrens System of land registration. Section 88 left very little doubt as to the interest of the plaintiffs who started with a registered interest over Lot 10 as the registered owner. This conferred to them a right *in rem*. At that point in time, Sanamas' interest was restricted to their existing SPA with the developer and, as such, their interest then was, at best, a right *in personam*. The principle of 'priorities' was, in some sense, supported by s. 103 of the SLO. On the

principles of priorities to competing equal equities where the first in time prevails, the Land Registry was not wrong in allowing Lot 10 to be registered into the names of the plaintiffs despite the presence of Sanamas' caveat. (paras 32, 34, 39 & 40)

- (3) The plaintiffs had, at all times, the right to be registered as the owner of Lot 10. Therefore, their ownership was continuous and ought not to be interrupted. The plaintiffs acted quickly in presenting a caveat over Lot 10 after signing the SPA with the developer while Sanamas waited for five years before deciding to present a caveat over the same. The actions of the plaintiffs were promptly and diligently carried out to be consistent with seeking the ownership in Lot 10. When the Land Registry registered the transfer of Lot 10 in favour of the plaintiffs, the plaintiffs' caveat was first in time and they had priority over the interest of Sanamas whose caveat was later in time, in the absence of fraud or defeating an interest under a bare trust. The issue of laches on their part or of limitation did not apply and they had every right to seek a reversal of the decision of the collector. The decisions of the collector and the director were wrong. (paras 41, 44 & 45)

Case(s) referred to:

Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd [1996] 2 CLJ 561 FC (dist)

Butler v. Fairclough 23 CLR 78 (refd)

Jasalam (M) Sdn Bhd v. Wong Koon Yee [2000] 2 CLJ 377 CA (refd)

Joddari v. The Personal Representative Of The Estate Of Sangkang Abu Saman, Deceased & Ors [2022] 1 LNS 35 HC (refd)

Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC (refd)

Sanamas Sdn Bhd v. Sazone Development Sdn Bhd (Suit K 22-15-2006) (Unreported) (refd)

Sia Hiong Tee & Ors v. Chong Su Kong & Ors [2015] 8 CLJ 1173 FC (dist)

Tebin Mostapa v. Hulba-Danyal Balia & Anor [2020] 7 CLJ 561 FC (refd)

Legislation referred to:

Land Ordinance (Sabah) (Cap 68), ss. 88, 116(3), (5), 118(1)

Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), (d)

Other source(s) referred to:

Judith Sihombing, *The National Land Code: A Commentary*, vol 3, p XXV 609, para [2601]

For the 1st appellant - Marina Tiu & Carl Malanjum; M/s Yap Chin & Tiu

For the 2nd appellant - Mohd Sani; Jabatan Peguam Besar Negeri Sabah

For the 1st & 2nd respondents - Roland Cheng & Dayang Afiqah; M/s Roland Cheng & Co

Reported by Najib Tamby

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JUDGMENT

Christopher Chin Soo Yin J:

The Facts In Brief

B [1] This is a case where a now defunct developer, Sazone Development Sdn Bhd (in liquidation) ("Sazone/Developer") disposed of the same shophouse held under document of title town lease 017545738 ("Lot 10") to two different parties, being the first defendant, Sanamas Sdn Bhd. ("Sanamas/first defendant") as well as to the plaintiffs. It follows that in this suit the plaintiffs on the one hand, and Sanamas/first defendant on the other, C are claiming their respective interest over Lot 10. The second defendant is the State land administration authority empowered to register caveats over lands as well as, in a *quasi*-judicial role, conduct land enquiries to deal with land disputes.

D [2] Over the course of several years and several proceedings both in the office of the second defendant as well as in the courts involving the now defunct developer, it is clear that the Sanamas/first defendant is not seeking possession and ownership of Lot 10 but rather the right to apply to auction off Lot 10, while it is registered in the name of Sazone/Developer, with the intention that the proceeds of sale be utilised to satisfy a judgment debt E Sanamas/first defendant had secured from the High Court against Sazone/Developer.

[3] The plaintiffs, on the other hand, are seeking unequivocal registered ownership and possession of Lot 10 free from the claims by Sanamas/first defendant.

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Enclosure 7 By The Plaintiffs

[4] The plaintiffs essentially sought in encl. 7 the following orders under O. 18 r. 19(1)(a), (b), (c), and (d) of the Rules of Court 2012:

- G (1) A declaration and order that the Memorandum of Transfer dated 27.10.2003 registered under Memorial No. 1021605 for transfer to the 1st and 2nd Plaintiffs from Sazone Development Sdn Bhd ("said Sazone/Developer") of Lot 10, Plaza Juta Block A, Likas held under individual title Town Lease no. 017545738, district of Kota Kinabalu, Sabah is valid and subsisting;
- H (2) A declaration and order that the 2nd Defendant's Order dated 26.03.2010 under Land Enquiry No. 3/2009 for cancellation of transfer to the 1st and 2nd Plaintiff from the said Sazone/Developer of Lot 10, Plaza Juta Block A, Likas held under individual title Town Lease no. 017545738, district of Kota Kinabalu, Sabah be null and void;

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| (3) A declaration and order that the Prohibitory Order dated 13.04.2017 and all other subsequent renewals thereto obtained by the Sanamas/1st Defendant against said Sazone/Developer pursuant to the High Court judgment on 23.05.2013 ("said Judgment") affecting Lot 10, Plaza Juta Block A, Likas held under individual title Town Lease no. 017545738, district of Kota Kinabalu, Sabah are null and void; | A |
| (4) A declaration and order that the post winding up action dated 08.01.2021 and 06.08.2021 by Sanamas/1st Defendant for leave to execute the said Judgment against the said Sazone/Developer <i>vide</i> the Prohibitory Order dated 13.04.2017 and leave to intervene as the proposed intervener in BKI-28NCC-2/2-2021 against the Plaintiffs respectively, and the said Auction be struck out for no cause of action and multiplicity of proceedings; | B |
| (5) An order that Sanamas/1st Defendant surrender to the 2nd Defendant for cancellation of the New Title deed issued for Lot 10, Plaza Juta Block A, Likas held under individual title Town Lease no. 017545738, district of Kota Kinabalu, Sabah within 14 days or such other time of order of Court. | C |
| | D |

Key Sequence Of Events

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| [5] The following are the key events gleaned from the cause papers and exhibits which shape this decision: | | E |
| 28 December 1996 | Sanamas/first defendant sold Lot 10 as vacant lot to Sazone/Developer for RM380,000; | |
| 22 February 1997 | Sanamas/first defendant signed memorandum of transfer for Lot 10 favouring Sazone/Developer; | F |
| 6 May 1997 | transfer of Lot 10 to Sazone/Developer was registered; | |
| 28 January 1997 | Sanamas/first defendant purchased Lot 10 from Sazone/Developer for RM1,100,000; | G |
| 16 August 2001 | plaintiffs purchased Lot 10 together with a four storey shophouse to be built thereon from Sazone/Developer for RM1,680,000; | |
| 20 August 2001 | caveat over Lot 10 was presented by plaintiffs with the S&P as the ground for caveatable interest (a gap of less than one week from date of S&P); | H |
| 22 August 2001 | plaintiffs' caveat over lot 10 was registered; | |
| 6 February 2002 | OCBC's (plaintiff's banker) caveat was registered on the basis of the plaintiffs' sale and purchase agreement with Sazone/Developer and letter of offer to plaintiffs for RM2.7m facilities, to part finance the acquisition of Lot 10 from the Sazone/Developer; | I |

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| A | 2 April 2002 | Sanamas/first defendant presents caveat over Lot 10 citing the sale and purchase agreement dated 28 December 1996 as grounds for caveatable interest; |
| | 11 April 2002 | Sanamas/first defendant's caveat is registered. (A gap of five years from the date of their S&P); |
| B | 27 October 2003 | Lot 10 is transferred to plaintiffs under memorial number 10421605(17) under a memorandum of transfer dated 23 August 2001; |
| C | 27 January 2006 | Sanamas/first defendant files a suit against Sazone/Developer the statement of claim praying for specific performance of the 1996 sale and purchase agreement as well as liquidated damages, interest and cost; |
| D | 26 March 2010 | second defendant (Assistant Collector For Land Revenue) orders that the transfer of Lot 10 dated 27 October 2003 from Sazone/Developer to the plaintiffs be cancelled ("dibatalkan"); and |
| E | 23 May 2013 | High Court, Kota Kinabalu allows Sanamas/first defendant monetary compensation of RM1,680,000, liquidated damages of RM234,656 and interest as well as costs but does not allow specific performance. |

The Current Status And The Issues Underlying Encl. 7

[6] When this case was called before me the status of Lot 10 and the parties were:

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| F | (i) the registered ownership in Lot 10 had been ordered by the second/defendant to be reverted back into the name of Sazone/Developer; |
| | (ii) Sazone/Developer is in liquidation; |
| G | (iii) the plaintiffs are in physical occupation and possession of Lot 10; and |
| | (iv) Sanamas/first defendant holds a monetary court judgment against Sazone/Developer and pursuant thereto had registered a prohibitory order over Lot 10. |
| H | [7] In essence, the plaintiffs seek unequivocal registered ownership of Lot 10 through: |
| | (i) a declaration that the memorandum of transfer executed by Sazone/Developer in their favour is good and registrable; and |
| I | (ii) to set aside the order of the second defendant's order cancelling the transfer of Lot 10 from Sazone/Developer to the plaintiffs. |

[8] On the other hand, Sanamas/first defendant, armed with a monetary judgment in its favour against Sazone/Developer seeks: A

(i) to maintain the ownership of Lot 10 in the name of Sazone/Developer following the order of the second defendant; and

(ii) armed with a prohibitory order, secure the sale of Lot 10 by public auction and apply the proceeds of sale to satisfy the monetary judgment awarded to them by the Kota Kinabalu High Court. B

[9] With the above scenario in mind, the task of this court is to see who has a better claim over the registered owner of Lot 10 as the decision of this issue will effectively determine the dispute between the plaintiffs as well as the Sanamas/first defendant. C

Order By The Second Defendant/Assistant Collector For Land Revenue

[10] Sometime in 2009, Sanamas/first defendant discovered that Lot 10 had been registered into the name of the plaintiffs. They then proceeded to apply to the second defendant to rectify the register (under s. 118(1) of the Land Ordinance) on the basis that the transfer of Lot 10 into the names of the plaintiffs ought not to be registered as Sanamas/first defendant had caveated the same Lot 10 earlier. Section 118(1) stipulates: D

118. (1) Except as is provided by subsections (4) and (5) any person claiming any estate or interest in land may at any time apply to the Collector for an order that any register, book or journal kept in his Land Office under this Ordinance shall be rectified, or that any entry may be made or interpolated in any such register, book or journal, or that any entry therein may be cancelled; and the Collector, after giving such notice of the application and making such enquiry as he may think fit, may either refuse such application, or, if satisfied as to the justice of the case, may make such order in reference thereto as he may think just. E F

[11] The second defendant on the 26 March 2010 ruled that the transfer of Lot 10 into the names of the plaintiffs was unlawful because it breached s. 116(3) of the Land Ordinance in that Lot 10 had been earlier caveated by Sanamas/first defendant. He then cancelled the transfers to the plaintiffs, which meant that ownership of Lot 10 was no longer the plaintiffs' but reverted back to Sazone/Developer. Section 116(3) states: G

(3) So long as any caveat shall remain in force, the Registrar shall not register any memorandum executed by the caveatee unless such memorandum shall be in accordance with the requirements of such caveat. H

[12] As required by s. 41 of the Land Ordinance, the next course of action of the aggrieved plaintiffs was to appeal to the Director of Lands and Survey against the decision of the Collector/second defendant. This they did and their appeal was dismissed. I

A No Fraud Or Bare Trustee Pleaded

[13] No fraud has been pleaded by either party. This is a simple case of Sazone/Developer selling the same property/Lot 10 twice to two different parties, that is, the plaintiffs as well as to Sanamas/first defendant. Hence, in the absence of any fraud, the question arises as to which of the two purchasers of the same Lot 10 have priority over the other to the extent of being entitled to be the registered and beneficial ownership in Lot 10 to the entire exclusion of the other.

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[14] Neither has any party claimed any interest on the basis that their rights were derived from the then registered owner holding the Lot 10 as bare trustee for them. In the suit initiated by Sanamas/first defendant against Sazone/Developer before the High Court in Kota Kinabalu, Sanamas/first defendant had contended that since they had signed the sale and purchase agreement and had paid the purchase price in full to Sazone/Developer, hence Sazone/Developer was holding Lot 10 as bare trustee for Sanamas/first defendant. His Lordship Justice Datuk Clement Skinner ruled in *Sanamas Sdn Bhd v. Sazone Development Sdn Bhd* (Suit K 22-15-2006) on the 23 May 2013 after a full trial that the concept of bare trustee did not apply as the pre-condition of Sanamas/first defendant being in possession of a signed and registrable memorandum of transfer from Sazone/Developer as mandated by the *Time's* case (below) was not proven to have existed.

C**D****E****Sanamas/First Defendant Was Not Allowed Specific Performance As Against Sazone/Developer Over Lot 10**

[15] On the issue as to whether Sanamas/first defendant would be entitled to specific performance against Sazone/Developer over Lot 10, His Lordship ruled in the same case after full trial:

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... I find on the facts before me that this is not an appropriate case to grant specific performance of the Lot 10 Agreement as the property concerned has been registered in the name of third parties (the Plaintiffs) and there is absolutely no evidence before me to suggest that the third parties (Plaintiffs), had acted wrongfully in buying and having Lot 10 transferred to their name. Further they are not parties to this suit and no relief is claimed against them or to set aside the registration of the transfer of Lot 10 in their names.

G**The Legal Effect Of The Private Caveat By The Sanamas/First Defendant****H**

[16] A key argument by Sanamas/first defendant is that before the plaintiffs were registered as the owners of Lot 10, Sanamas/first defendant's caveat was registered against Lot 10. Put simply, the land registry registered the transfer of Lot 10 into the name of the plaintiffs despite the existence of Sanamas/first defendant's registered caveat.

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[17] It must be borne in mind that at the time Lot 10 was registered into the names of the plaintiffs, the plaintiffs together with their financier OCBC Bank Malaysia Berhad, had earlier registered caveats over Lot 10 and these caveats were prior to Sanamas/first defendant's caveat. A

[18] It is trite that a private caveat under the Sabah Land Ordinance serves two functions. Firstly, the effect of a caveat is injunctive in nature in that it restricts (but not absolutely) dealings by the landowner/caveatee of any interest in the land in the land caveated: B

Section 116(3) Land Ordinance:

... so long as any caveat shall remain in force, the Registrar shall not register any memorandum executed by the caveatee unless such memorandum shall be in accordance with the requirements of such caveat. C

[19] If for example the caveator's interest is limited to an undivided share and not the whole share in the land caveated, then the caveat can be worded to limit its injunctive effect to the undivided share of the caveator with liberty on the part of the caveatee/landowner to deal with the remaining unaffected share in the land concerned. In that sense, in Sabah, a private caveat's injunctive effect is not absolute. D

[20] Secondly, the purpose of a private caveat is to give notice of the interest the caveator has over the land concerned. Such interest has to be a "caveatable interest", which is not defined in the Sabah Land Ordinance and is the subject of numerous court decisions on its scope. At the very basic level, a caveatable interest is to protect a dealing that is pending and capable of registration and is hence a contingent interest (contingent upon registration), which would lead to a transfer, charge or sub-lease of the land caveated to and in favour of the caveator. E F

[21] In *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944, the Federal Court had ruled:

It is trite law that caveats are to be used for the protection of alleged as well as proved interests and that a caveat is merely a warning which creates no new rights but protects existing rights, if any. G

Judith Sihombing, *The National Land Code: A Commentary* vol. 3, at p. XXV 609, para. [2601] states as follows:

Since Private Caveat does not alter the ownership of the land or interest, and merely acts **to give notice of and priority to the claim**, any number of private caveats can be entered on the title and all give priority in the temporal order of endorsement. (emphasis added) H

[22] One thing is clear. The private caveat gives notice of the caveator's interest in the property but it does not create any interest in land. A caveat is presented unilaterally which is unlike any other dealing where parties I

- A execute the prescribed memorandum provided by the Sabah Land Ordinance to evidence an enforceable dealing by way of transfer, charge or sub-lease and then produce with the memorandum the issue copy of the document of title for registration of such presented dealing. A caveat merely gives notice to the world of the presence of an interest belonging to someone other than the registered proprietor.
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[23] This discussion would not be complete without consideration of the appellate courts' scrutiny of the Sabah Land Ordinance starting with the case of *Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd* [1996] 2 CLJ 561 ("*Time's case*"). Tan Sri Dato Edgar Joseph Jr FCJ delivered the decision of the Federal Court (which quorum was made up of Tan Sri Dato' Mohd Eusoff Chin CJ and Datuk Wira Wan Yahya Pawan Teh FCJ) which included the following words (paraphrasing):

- C
- D The system of land tenure in Sabah is not an absolute Torrens system but a modified Torrens system of Land Registration. Unlike the position in Peninsular Malaysia and Sarawak, where there are express provisions conferring indefeasibility of title ... there is no provision in the (Sabah Land) Ordinance conferring indefeasibility of title to or interests in land which is a feature of central importance to the Torrens system of Land Registration.

- E [24] This discussion is necessary because:

- F firstly, the above Federal Court decision suggest that at least in Sabah, registration is **not** everything, and therefore the question arises whether the unregistered interest of the Sanamas/1st Def can overreach the Plaintiff's registered interest at the time the Land Enquiry by the 2nd Defendant/Collector held on the application of Sanamas/1st Def and
- secondly, if the registered interest of the Plaintiffs is defeasible, than the argument arises as to whether an unregistered interest of Sanamas/1st Def rank prior over the registered ownership of the Plaintiffs.
- (emphasis added)

- G [25] This idea of a modified Torrens System in Sabah was extended and reinforced in the case of *Sia Hiong Tee & Ors v. Chong Su Kong & Ors* [2015] 8 CLJ 1173; [2015] 4 MLJ 188 ("*Sia's case*") where the landowners' registered interest was defeated by the fact that the power of attorney which was used to transfer the registered ownership to them was a forgery.

- H [26] The principles established in the above two landmark cases can be distinguished from the present case on the following grounds:

- I (i) the above two Federal Court decisions involve conflicting or questionable registered interests where the interest arose from an element of fraud or under the concept of bare trustee;
- (ii) in the latter case (*Sia Hiong Tee*) there was a finding of fraud in achieving an earlier dealing which had the effect of defeating a subsequent registered interest. There is no issue of forgery or fraud pleaded in the present case;

- (iii) in the present case, the issue of indefeasibility does not arise nor is it part of the pleaded case of any of the parties; and A
- (iv) the present case involves conflicting equities or claims by two purchasers over the same property.

What Is A Modified Torrens System Of Land Registration In Sabah? B

[27] Law students attending their first lecture on land law are immediately reminded that the issue of land in some manner affects every facet of human activity and for eons. Land law is perhaps the most fundamental of all laws in any civilised jurisdiction. It is no different in Malaysia, in particular in Sabah. There must be certainty in ownership of any interest in land as well as certainty and priority as to the dealings in such registrable interest. C

[28] The Federal Court cannot in the *Time's* case and *Sia's* case have intended undermining the administration of land law in Sabah when they described Sabah's Land Ordinance as a modified Torrens System. One thing is clear, the Federal Court never defined what a modified system entailed or its scope and limitations. D

[29] Based on the above two cases, the views of the Federal Court necessarily must, in the interest of certainty of land interests in Sabah, be limited and construed strictly and narrowly to the fragility of registered interests derived from some fraudulent act, or, against the interest of a beneficiary under an established bare trustee arrangement. E

Put simply, and by virtue of s. 88 of the Land Ordinance, (below) registration is still everything in Sabah save in cases where an interest in land is derived through a fraudulent act or of a beneficiary under a bare trust being wrongly dispossessed of his right to a registered interest in the land concerned. F

The Sabah Land Ordinance

[30] The starting point in any legal discussion as to interest in land, whether such interests are conflicting, starts with the consideration of the letter of the law manifested in the case of Sabah in the Land Ordinance (Cap 68). G

[31] In *Tebin Mostapa v. Hulba-Danyal Balia & Anor* [2020] 7 CLJ 561; [2020] 4 MLRA 394 the Federal Court ruled succinctly:

- (e) ... the provisions in an enactment should be interpreted purposively and harmoniously and within the contextual background in which the provisions of statute presented themselves. Further, the statutory provisions should not be interpreted *in vacuo*; statutory provisions were interpreted to be applied to the established facts of a case. Accordingly, it was important to consider the factual matrix under which the question of law arose. H
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- A [32] Section 88 of the Sabah Land Ordinance is evidence, if any is required, that Sabah land law has adopted, perhaps not in the way as it has been embraced in West Malaysia or in Sarawak, the Torrens System of land registration (with emphasis):

No title or claim to land valid unless registered

- B 88. No new title and no dealing with, **claim to or interest in any land** except land still held under native customary tenure without documentary title **shall be valid until it has been registered in accordance with the provisions of this Part.** (emphasis added)
- C [33] Mention of “this Part” above refers to Part V of the Land Ordinance under the heading of “Registration”. In this “Part V” are the range provisions to allow for the registration of dealings as well as incidental issues to dealings such as caveats, attestation, powers of attorney, among others. More critical and as the standard in any Torrens jurisdiction are the processes and significance of every step of a dealing up to the time of registration, such as
- D presentation, prescription of memorial number, registration and the issue of priorities.

- E [34] Section 88 above leaves very little doubt as to the interest of the plaintiffs who started with a registered interest over Lot 10 as registered owner. This conferred to them a right *in rem*. At that point in time the Sanamas/first defendant’s interest was restricted to their existing sale and purchase agreement with Sazone/Developer and as such their interest was then, at best, a right *in personam*.

- F **Conflicting Equities/Caveats – Was The Second Defendant Right In Setting Aside The Registered Ownership Of The Plaintiffs In Lot 10 On Account Of The Existing Caveat By Sanamas/First Defendant**

- G [35] When the Registrar of Lands registered the transfer of Lot 10 into the names of the plaintiffs on the 27 October 2003, there were two prior caveats registered against Lot 10. The first and earlier one by the plaintiffs dated 22 August 2001 and, the second and later, by Sanamas/first defendant dated 11 April 2002. Both caveators have signed sale and purchase agreements with Sazone/Developer and both had settled the purchase price in full. Who had a better claim over Lot 10 then?

- H [36] In the case of *Jasalam (M) Sdn Bhd v. Wong Koon Yee* [2000] 2 CLJ 377, the Court of Appeal was considering, *inter alia*, the priority of two parties with valid equitable interest in the land in dispute. In that case, the Court of Appeal followed the principle established in an Australian case of *Butler v. Fairclough*, 23 CLR 78, that in “the case of a contest between two equitable claimants, the first in time, all other things equal, is entitled to priority.”

- I [37] In the Tawau High Court case of *Joddari v. The Personal Representative Of The Estate Of Sangkang Abu Saman, Deceased & Ors* [2022] 1 LNS 35, His Lordship Justice Dr Lim Hock Leng cited and ruled as follows as to effect of caveats (emphasis added):

[53] And in *Abigail v. Lapin* [1934] AC 491, the Privy Council approved the following passage of the Australian court:

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In the case of a contest between two equitable claimants the first in time, all other things being equal, is entitled to priority. But all other things must be equal, and the claimant who is first in time may lose his priority by any act or omission which had or might have had the effect of inducing a claimant later in time to act to his prejudice.

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[54] The purchaser in the instant case did not lodge a caveat after the title was issued on 2 February 2014 in the name of Sangkang. He also, significantly, neglected or failed to lodge a caveat over the land to warn off prospective purchasers, even after he came to know that the 2nd defendant had claimed the land as part of Sangkang's estate.

C

[38] In Sabah, anyone who can show some semblance of caveatable interest can present a caveat. Any number of caveats can be presented over the same land. The Collector both in the central land office and in the outlying district land offices who have to decide on whether there is a caveatable interest are not legally trained. The Collector who presided in the land enquiry in this case was also not a lawyer but rather a surveyor by training. It would be unfair to expect the second defendant or the Director of Lands (also no requirement to be legally trained or qualified) who heard the appeal to apply legal precepts of competing equities in deciding the land enquiry or the appeal therefrom. As the parties were legally represented in this case, it is not fair to expect such collectors or the director to understand, digest and distil from voluminous legal submissions of the parties, clear legal points of law and to know how to apply such legal tenets to the case in hand. It is thus possible for any unscrupulous person with maleficent intentions, to hijack a genuine claimant of an interest in land by simply presenting a caveat on frivolous grounds over the land in question.

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[39] This principle of "priorities" is in some sense supported by s. 103 of the SLO which states:

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103. All memorials and memoranda shall be numbered serially in order of priority of registration. For the purpose of priority, the time of presentation shall be taken as the time of registration, without regard to the date of the execution of the memorandum, or to any express or implied or constructive notice contained in the document.

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[40] On the principles of priorities to competing equal equities where the first in time prevail, the land registry was not wrong in allowing Lot 10 to be registered into the names of the plaintiffs despite the presence of Sanamas/first defendant's caveat. This therefore points to the second defendant taking too strict and literal an interpretation of s. 116(3) of the Land Ordinance relating to the injunctive effect of caveats.

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A [41] As it is the decision of this court that the plaintiffs had at all times the right to be registered as the owner of Lot 10, therefore their ownership is continuous and ought not to be interrupted, the issue of laches on their part or of limitation does not apply in this case and they had every right to seek a reversal of the decision of the second defendant.

B *Was The Registrar Of Titles Wrong To Register The Ownership Over Lot 10 To The Plaintiffs Despite A Subsequent Caveat By Sanamas/First Defendant Over The Title To Lot 10?*

C [42] It has been established earlier that in the case of competing equities and all being equal and there being to facts to import the issue of fraud or bare trustee, the first in time prevails. The Registrar has every right to register the transfers into the names of the plaintiffs because such registration was in accordance with the requirements of the plaintiffs' caveat. Section 116(3) of the SLO (with emphasis):

D (3) So long as any caveat shall remain in force, the Registrar shall not register any memorandum executed by the caveatee **unless such memorandum shall be in accordance with the requirements of such caveat.** (emphasis added)

E [43] Hence, despite the presence of any number of subsequent competing private caveats registered over any parcel of alienated land, the Registrar is empowered, and indeed has a duty to register, the dealing evidenced by the earliest private caveat, provided only that such dealing is in accordance with the requirements of such caveat as per s. 116(3) (above).

F This principle would not apply if there is a collector's caveat under s. 116(5) of the SLO registered over the land concerned and regardless of the priority of such collector's caveat.

Conclusion

G [44] Considering the facts of this case, in particular the chronology of events and appraising such facts against the various principles of law highlighted earlier in this decision, I now decide that the plaintiffs have a better claim over Lot 10 than Sanamas/first defendant and my distilled reasons for ruling so are as follows:

H (i) the plaintiffs acted quickly in presenting a caveat over Lot 10 after signing the sale and purchase agreement with Sazone/Developer, whereas Sanamas/first defendant present a caveat only several years after signing their sale and purchase agreement. The actions of the plaintiffs were promptly and diligently carried out to be consistent with seeking ownership in Lot 10;

I (ii) Sanamas/first defendant waited for five years from 1997 before deciding to present a caveat over Lot 10. Sanamas/first defendant must have known there was already a sub-divided document of title for Lot 10

- capable of being caveated as it was Sanamas/first defendant who had earlier disposed of and conveyed the ownership in the individual subdivided title to Lot 10 to Sazone/Developer; A
- (iii) when the land registry registered the transfer of Lot 10 in favour of the plaintiffs, the plaintiffs' caveat was first in time and they had priority over the interest of Sanamas/first defendant whose caveat was later in time, in the absence of fraud or defeating an interest under a bare trust; B
- (iv) Sanamas/first defendant came to the High Court and sought ownership of Lot 10 by seeking specific performance of the terms of its sale and purchase agreement with Sazone/Developer. They failed to get specific performance and the High Court Kota Kinabalu, after a full trial, decided to reduce their interest in Lot 10 to monetary judgment against Sazone/Developer, with no proprietary interest in Lot 10; C
- (v) in the same High Court case initiated by Sanamas/first defendant but without the registered owners, the plaintiffs, being included as a party, the learned judge, His Lordship Datuk Clement Skinner had ruled that the transfer of Lot 10 by Sazone/Developer to third parties (*ie*, the plaintiffs) was not invalid and that there was no evidence of any impropriety or illegality in the transfer; D
- (vi) hence, the contention made by Sanamas/first defendant to the second defendant/Collector that the transfer by Sazone/Developer to the plaintiffs was illegal is and thus seeking to cancel the transfer from the Register is not sustainable and incorrect; and E
- (vii) while the plaintiffs sought registered ownership over Lot 10, Sanamas/first defendant interest was geared towards securing a sale of Lot 10 through their prohibitory order, in the execution of the monetary judgment they have over Sazone/Developer; F
- [45] The diligence of the plaintiffs tip the balance over the laches of Sanamas/first defendant. I decide that the interest of the plaintiffs in this case rank prior over the interest of the Sanamas/first defendant and therefore rule in favour of the plaintiffs in that the plaintiffs had every right to be the registered owners of Lot 10. As a result of this decision I find that the decision of the second defendant and that of the Director of Lands and Survey, in the appeal, to be wrong and accordingly allow order in terms of encl. 7. Costs to the plaintiffs in the sum of RM5,000 subject to allocatur. G H
- Postscript**
- [46] Sanamas/first defendant subsequently applied for a stay of my decision above pending their appeal against the same. Sanamas/first defendant also sought to apply to renew their prohibitory order over Lot 10. As there were special circumstances in that the *status quo* already favoured the plaintiffs as they were in occupation of Lot 10, I allowed the stay but I

- A refused the renewal of the prohibitory order. On the 6 April 2023, I additionally ordered the following to preserve the *status quo* in relation to Lot 10 pending appeal on the following terms:

- B In the circumstances, taking into account the status of Lot 10, the earlier judgment in favor of Sanamas/1st Defendant and my present ruling in favor of the Plaintiffs, I am satisfied there are sufficient circumstances to allow the stay of the execution of my judgment until this matter is ventilated to and decided by the Court of Appeal. However, the application to extend or renew the prohibitory order over Lot 10 by the 1st Defendant is denied.
- C And with this respect, any proceedings to execute the judgment delivered on 23.05.2013 (in favour of Sanamas/1st def) is also stayed. Finally, to ensure the *status quo* of Lot 10 is preserved pending the disposal of the appeal of this case, I additionally order that a Collector's caveat be forthwith registered against Lot 10 pursuant to S. 116(5) of the Land Ordinance to prevent any improper dealing with Lot 10 and such caveat shall remain registered over Lot 10 until cancelled by the Court. Counsel
- D are to notify the 2nd Defendant of today's order.

No order as to costs in respect of today's order.

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